NO. 83-6084

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1983

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ALEXANDER L. STEVAS,
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WILLIAM NEAL MOORE,

Petitioner,

v.

CHARLES BALKCOM, WARDEN
AND ARTHUR K. BOLTON,
ATTORNEY GENERAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the United States Court of Appeals for the Eleventh Circuit properly applied this Court's decision in Eddings v. Oklahoma, 455 U.S. 101 (1982), in finding that the sentencer did not refuse to consider mitigating circumstances in determining that Petitioner should receive a sentence of death, but rather found that the death penalty was authorized by a statutory aggravating circumstance and a nonstatutory aggravating circumstance?

2.

Whether the United States Court of Appeals for the Eleventh Circuit properly confined its review of the imposition of the death penalty in this case to determining whether or not the death penalty had been freakishly imposed and properly declined to conduct a de novo proportionality review?

3.

Whether the United States Court of Appeals for the Eleventh Circuit properly applied the principles of Henderson v. Morgan, 426 U.S. 637 (1975) in determining that Petitioner's guilty plea was voluntarily entered, as there is no requirement that a state court accepting a guilty plea inquire into a defendant's knowledge of each of the elements of the crime?

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PART ONE

STATEMENT OF THE CASE

Petitioner, William Neal Moore, was indicted by the Grand Jury in the Superior Court of Jefferson County, Georgia, for the offenses of malice murder and armed robbery of Fredger Stapleton. Petitioner waived a trial by jury with respect to both charges on June 4, 1974, and entered a plea of guilty to the charges. Petitioner's sentencing hearing was set for July 17, 1974. On that date, the sentencer imposed the death penalty upon Petitioner, following the receipt of certain testimony in evidence for the Court's consideration.

The Supreme Court of Georgia affirmed Petitioner's convictions and sentences in Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975). The Supreme Court of Georgia in its opinion conducted the sentence review which is mandatory in all cases in which the death penalty has been imposed in accordance with O.C.G.A. § 17-10-35. The Supreme Court of the United States denied Petitioner's petition for a writ of certiorari on July 6, 1976 in Moore v. Georgia, 429 U.S. 873 (1976). A petition

for a declaratory judgment was denied by the Superior Court of Jefferson County and the judgment of that court was affirmed by the Supreme Court of Georgia in Moore v. State, 239 Ga. 67, 235 S.E.2d 519 (1977). The petition for certiorari to review this judgment was denied by this Court in Moore v. Georgia, 434 U.S. 878 (1977).

Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. An evidentiary hearing was conducted on March 30, 1978. In an order dated July 13, 1978, the court denied Petitioner the relief sought. On October 17, 1978, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal.

On November 22, 1978, Petitioner filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Georgia. Following a hearing on June 18, 1979, the district court granted federal habeas corpus relief, vacating Petitioner's sentence of death on the basis that the penalty was cruel and unusual under the circumstances of this case. Respondent's appealed to the Circuit Court and Petitioner cross-appealed. Following oral argument, a panel of the United States Court of Appeals for the Eleventh Circuit reversed the district court's judgment, insofar as the district court had conducted its own proportionality review, but granted habeas corpus relief on the basis that the sentencing court had unconstitutionally applied a non-statutory aggravating circumstance. The Respondent filed a suggestion for rehearing en banc based on the latter portion of the panel opinion and the petition for rehearing was granted, with the prior panel opinion dated June 23, 1983 being withdrawn and a new opinion, dated Setpember 30, 1983, being substituted in its place. In its decision of September 30, 1983, the United States Court of Appeals for the Eleventh Circuit reversed that portion of its prior opinion granting federal habeas corpus relief.

Petitioner Moore then filed a petition for rehearing and suggestion for rehearing en banc which was denied on December 13, 1983. It is the panel decision in Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983), as modified by order of the court dated December 13, 1983, that is the subject of the instant petition for writ of certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY FOUND NO VIOLATION OF THE CONSTITUTIONAL PRINCIPLES ENUNICATED IN THIS COURT'S DECISION IN EDDINGS V. OKLAHOMA, 455 U.S. 104 (1982) WITH REFERENCE TO THE SENTENCER'S DECISION TO IMPOSE DEATH UPON PETITIONER.

Petitioner urges this Court to grant his petition for a writ of certiorari based on his contention that the United States Court of Appeals for the Eleventh Circuit failed to follow the holding of this Court in Eddings v. Oklahoma, 455 U.S. 104 (1982), in which the Court held that a sentencer may not refuse to consider as a matter of law any relevant mitigating circumstances. Eddings v. Oklahoma, supra at 113-15. The United States Court of Appeals for the Eleventh Circuit properly found the facts in this case to be distinguishable from those presented to this Court in Eddings v. Oklahoma, supra and found no constitutional error in the sentencer's imposition of the death penalty upon Petitioner. In Eddings v.Oklahoma, supra, the trial judge stated that, "in following the law," he could not 'consider the fact of this young man's violent background.'" Eddings v. Oklahoma, supra at 113. This Court interpreted this statement by the trial court in Eddings v. Oklahoma, supra, as follows:

> From this statement is is clear, that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that as a matter of law he was unable to even consider the evidence.

Id.

This Court went further and found that it was as if the trial judge had instructed a jury to disregard mitigating evidence as a matter of law, and found that the sentencer may determine the weight to be given relevant mitigating evidence, but may not give it no weight, i.e., exclude the evidence from consideration. Eddings v. Oklahoma, supra at 114.

The facts of this case are easily distinguishable from those found to be present in Eddings v. Oklahoma, supra. As the United States Court of Appeals for the Eleventh Circuit noted in Moore v. Balkcom, 716 F.2d 1511, 1524 (11th Cir. 1983), an interpretation of the sentencer's comments in this case, i.e., Judge Walter McMillan shows the following:

> The record indicates that Judge McMillan views the statutory aggravating circumstances and the location of the murder and robbery as so aggravating the crime as to outweigh all mitigating circumstances involved in the case. Such an evaluation comports with the constitutional requirement of an individualized sentencing decision. See Lockett v. Ohio, 438 U.S. 586. 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc). Id.

Essentially, this issue presents no federal constitutional question for this Court's resolution, but rather presents a question of fact, i.e., the interpretation of the sentencer's statements as to whether or not he viewed himself as precluded from considering mitigating factors or whether the sentencer found that the aggravating circumstances, both statutory and nonstatutory, outweighed the mitigating circumstances which Judge McMillan had already considered. In Moore v. Balkcom, supra, the court noted the statements of Judge McMillan which were also cited by the Supreme Court of Georgia as listing

mitigating circumstances found by Judge McMillan. Specifically, the judge noted that Petitioner had done "an honorable thing insofar as your true statements made, your cooperation with the officials, pleading guilty to the mercy of the court . . . " (Sentencing Hearing Transcript, p. 54). The United States Court of Appeals for the Eleventh Circuit also noted in its order of December 13, 1983, "Judge McMillan properly considered all of the evidence in mitigation before exercising his discretion to impose death." Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983), modified at ___ F.2d ____ No. 81-7418, December 13, 1983. The Eleventh Circuit properly found that Judge McMillen understood discretionary sentencing as set forth under Georgia law at that time as contained in such cases as Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974). The United States Court of Appeals for the Eleventh Circuit properly held that "We are satisfied that the Court considered all the evidence offered in mitigation before imposing death and are satisfied that the court understood that it possessed discretion to impose a life sentence." Moore v. Balkcom, Slip. Op. at 1031.

As the United States Court of Appeals for the Eleventh Circuit noted, Judge McMillan listened to the presentation of mitigating evidence on Petitioner's behalf and asked each witness questions. (Sentencing Hearing Transcript, p. 42-48). For example, Judge McMillan asked Petitioner's brother, James Moore, whether Petitioner had ever been in any kind of trouble, how many brothers and sisters had been in Petitioner's family and the health of Petitioner's mother and father. (Sentencing Hearing Transcript, p. 43). Petitioner's brothers and sisters presented mitigating evidence by testifying that Petitioner had never been in any kind of trouble (Sentencing Hearing Transcript, p. 42); had been in the service (Sentencing Hearing Transcript, p. 42-43); that Petitioner had had no father when he grew up, and that things were "tough (Sentencing Hearing Transcript, p. 45); that Petitioner had been a "pretty good

boy" and had been drinking at the time the incident occurred (Sentencing Hearing Transcript, p. 46); and that Petitioner had been a good student, and had good grades in school (Sentencing Hearing Transcript, p. 47). Petitioner's own testimony revealed mitigating circumstances in the form of Petitioner's statement that he did not mean to kill the victim and that he was sorry. (Sentencing Hearing Transcript, p. 47). Further, Petitioner stated that the victim came out with a shotgun and it scared Petitioner into killing him. (Sentencing Hearing Trasncript, p. 48).

Judge McMillan cited the death penalty statute as requiring proof of aggravating circumstances to justify the imposition of the death penalty. (Sentencing Hearing Transcript, p. 51-52). Judge McMillan noted that discretionary sentencing was sanctioned by Georgia law, although the Justices of this Court at that time were in conflict as to whether or not there would be mandatory or discretionary sentencing in capital cases. (Sentencing Hearing Transcript, p. 52). The Court after passing sentence noted that in Georgia, it had been determined that discretionary sentencing was appropriate. (Sentencing Hearing Transcript, p. 53-55). The Court stated:

> So, I found aggravating circumstances. I also found, but I didn't need to find, for purposes of this finding, mitigating circumstances insofar as the aggravating circumstances were concerned. Mitigating means good circumstances, those being your willingness and your forthrightness in meeting what must be to you a terrible, terrible experience. So that does go to your credit, but for the purposes of this Court, for this finding, I could not in good conscience apply in your case sufficient to wipe out the aggravating statutory circumstances.

(Sentencing Hearing Transcript, p. 56).

It is clear from the facts of this case that no constitutional violation is present, but rather that as a matter of fact, the sentencer found that the statutory aggravating circumstance and the nonstatutory aggravating circumstance warranted the imposition of the death penalty, even in light of the mitigating circumstances the trial court found to be presented in the case. As aforestated, no federal constitutional question is presented for this Court's review.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY ACCORDED DEFERENCE TO THE SUPREME COURT OF GEORGIA'S METHOD OF CONDUCTING PROPORTIONALITY REVIEW AND DECLINED TO CONDUCT ITS OWN DE NOVO PROPORTIONALITY REVIEW.

Petitioner contends that the sentencer imposed the death sentence upon Petitioner arbitrarily and capriciously, as he allegedly "misunderstood the range of his sentencing discretion and focused on one circumstance of the crime to the exclusion of the array of mitigating factors concerning the defendant." However, as Respondent has already stated with reference to the first reason for granting the writ raised by Petitioner, the United States Court of Appeals for the Eleventh Circuit properly determined that the sentencer in Petitioner's case had comported with the requirements of Georgia law as interpreted in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983) The sentencer finding a statutory aggravating circumstance and a nonstatutory aggravating circumstance, and did not improperly refuse to consider mitigating circumstances, but rather, found that the aggravating circumstances justified the imposition of the death penalty. Moore v. Balkcom, supra, at 1524-1525. Therefore, Respondent does not concede in any way that the imposition of the death penalty was arbitrary or capricious in

this case, as it was authorized by a statutory aggravating factor and a nonstatutory aggravating factor as provided for under the Georgia capital sentencing scheme in Zant v. Stephens, supra.

Petitioner argues that if the Supreme Court of Georgia had applied what he contends would have been an adequate test for comparability, that the allegedly arbitrary nature of the death sentence would have been exposed. Petitioner further alleges that he was denied his opportunity to show that an inadequate test of comparability was applied and that the United States Court of Appeals for the Eleventh Circuit improperly declined to conduct its own proportionality review.

As this Court is well aware, the Georgia capital sentencing scheme, including the proportionality review inherent in the statute under mandatory appellate review, was upheld by this Court in Gregg v. Georgia, 428 U.S. 153 (1976). However, in this Court's recent decision in Pulley v. Harris, ___ U.S. ___ S.Ct. ___ (1984), the Court found that its decision in Gregg v. Georgia, supra did not require that a capital sentencing statute contain provisions for proportionality review. Pulley v. Harris, Slip. Op. at p. 8. In Pulley v. Harris, supra, this Court also noted that the focus of the Georgia statute, as interpreted in Zant v. Stephens, supra, was the jury's finding of statutory aggravating cicumstances, not the decision of the Supreme Court of Georgia findings as to proportionality. In Pulley v. Harris, supra, Slip. Op. at p. 13, this Court found that proportionality was "an additional safeguard against arbitrarily imposed death sentences." Id. In this case, Petitioner's death sentence was supported by a statutory aggravating circumstance, i.e., that the offense of murder had been committed during the course of another capital felony, to-wit armed robbery, and the Supreme Cout of Georgia properly performed its appellate review obligation in Petitioner's direct appeal to that court. Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975). Thus, the Georgia statutory

scheme was followed in this case and serves to establish that Petitioner's death sentence was validly and constitutionally imposed.

It should be noted that Petitioner did have the opportunity to present evidence and make argument on cases allegedly comparable to that of Petitioner, so as to require that a life sentence be imposed, to the Supreme Court of Georgia on direct appeal to that court. Petitioner also had the option of moving for rehearing before the Supreme Court of Georgia once the Supreme Court had entered its decision and of attaching an appendix of arguably similar cases to be considered in determining whether or not Petitioner's death sentence had been arbitrarily and capriciously imposed. Petitioner could have sought to attack the review made by that Court in such a motion for rehearing. Therefore, the statutory scheme properly operated in this case and afforded Petitioner the opportunity to present any evidence of arbitrariness, capriciousness or disproportionality with respect to the imposition of the death penalty in Petitioner's case.

Petitioner then sought to have the federal habeas corpus court conduct a de novo proportionality review of Petitioner's case, comparing it to other similar cases. The United States Court of Appeals for the Eleventh Circuit found this to be an inappropriate exercise to be undertaken by a federal habeas corpus court and reversed the district court's decision wherein the district court judge had undertaken his own disproportionality review. Moore v. Balkcom, supra at 518-519.

The basis of the decision of the United States Court of Appeal for the Eleventh Circuit was solidly grounded in federal constitutional principles and notions of comity. The United States Court of Appeals for the Eleventh Circuit did review the record and determined that the proportionality review in this case conducted by the Supreme Court "provided an adequate safeguard against the freakish imposition of capital punishment." Id. The United States Court of Appeals for the

Eleventh Circuit also properly determined that the review of the Georgia Supreme Court "did not shock the conscience." Moore v. Balkcom, supra at 1519. The United States Court of Appeals for the Eleventh Circuit properly determined that:

> A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, 'get out the record' to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the 'evidence' in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state. It is the state's responsibility to determine the procedure to be used, if any, in sentencing a criminal to death. See California v. Ramos, 103 S.Ct. at 3451-53.

Moore v. Balkcom, supra at 1518.

Because the Georgia death penalty statute contains a method of proportionality review which has been found to be constitutional on its face, the United States Court of Appeals for the Eleventh Circuit properly confined its examinationof the Georgia Supreme Court's appellate review to determining if such appellate review provided an adequate safeguard against the freakish imposition of capital punishment. No further review is constitutionally required. As the circuit court noted in footnote 6 of its opinion:

> A federal habeas court may not conduct a de novo proportionality review and thereby inject itself into the state sentencing procedure. Our review remains confined to whether the state sentencing procedure both on its face and as applied violates the

Eighth and Fourteenth Amendments. See Spinkellink v. Wainwright, 578 F.2d at 606 n. 28.

Moore v. Balkcom, supra at 519 n. 6.

As it is apparent that the United States Court of Appeals for the Eleventh Circuit properly examined the Supreme Court of Georgia's proportionality review procedure, as required under constitutional principles, and as Georgia's proportionality review is not constitutionally required, the issue of whether or not the Supreme Court of Georgia provided a "inadequate test fof comparability" does not present a federal constitutional question for review by this Court.

III. PETITIONER'S GUILTY PLEA COMPLIED WITH THE REQUIREMENTS OF HENDERSON V. MORGAN, 426 U.S. 637 (1976) SO AS TO SUFFICIENTLY ESTABLISH THE VOLUNTARINESS OF PETITIONER'S PLEA OF GUILTY.

Petitioner argues that his guilty plea is invalid because the record of the sentencing procedures, alone, does not demonstrate that Petitioner understood the elements of the crime. The United States Court of Appeals for the Eleventh Circuit noted that records compiled from post-conviction proceedings may supplement the trial transcript in order for a determination to be made as to whether a plea was voluntary. Moore v. Balkcom, supra at 1525, citing Pollinzi v. Estelle, 628 F.2d 417, 418 (5th Cir. 1980). The United States Court of Appeals for the Eleventh Circuit properly noted that the record in this case met the requirements of Henderson v. Morgan, 426 U.S. 637 (1976), had been met, i.e., that it had been established that Petitioner understood the constitutional protections he was waiving by entering his plea and that he understood the charges against him. Petitioner has failed to cite any constitutional protections which would afford

Petitioner the right to have any other determinations made on the record, but instead, seeks to assert as a policy matter that state courts should adopt Rule 11 of the Federal Rules of Criminal Procedure, which rule provided that each individual element of the crime be addressed in the guity plea proceedings. The United States Court of Appeals for the Eleventh Circuit in Moore v. Balkcom, supra, correctly determined that under this Court's decision in Henderson v. Morgan, supra, all that is required is that the judge "explain the statutes sufficiently to give the defendant real and adequate notice of the nature of the charge against him or find proof that the defendant in fact understood the charge." Moore v. Balkcom, supra at 1526. The United States Court of Appeals for the Eleventh Circuit properly determined that this standard was met upon reviewing the record of the guilty-plea proceeding, including Petitioner's answers to questions posed in open court and the testimony from Petitioner's attorney, at which testimony was given at the state habeas corpus hearing. The appropriate standard was applied by the United States Court of Appeals for the Eleventh Circuit and no constitutional question present itself to this Court for review.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari filed on behalf of William Neal Moore, as no federal constitutional questions are presented for review by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of the same in the United States mail with proper address and adequate postage to:

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This 13th day of February, 1984.

Susan V. Boleyn

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